84-827

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No.

IN THE

# Supreme Court of the United States

October Term, 1984

HONORABLE JOHN WESTHAFER, as JUDGE of the CIRCUIT COURT of DECATUR COUNTY, INDIANA, *et al.*,

*Appellants,*

v.

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, *et al.*,

*Appellees.*

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED BY APPEAL

1. Whether a State has any power to statutorily authorize judicial protection of the administration of justice by use of indirect contempt procedures against the press subsequent to disclosure, before arrest, of the specific fact that a particular sealed criminal indictment or information is in existence or pending.

2. Whether the State's interest in preserving public safety and health is a compelling state interest that is sufficient to justify the subsequent use of indirect contempt procedures, when no less restrictive and effective means are available, against the press for disclosing, before arrest, the specific fact that a particular sealed criminal indictment or information is in existence or pending.

## LIST OF PARTIES

Appellants in this case are the Honorable John Westhafer, as the Judge of the Circuit Court of Decatur County, Indiana, and Kenneth Bass, as the Prosecutor of Decatur County, Indiana. Appellees in this case are Worrell Newspapers of Indiana, doing business as the Greensburg Daily News, and Karen McKinley, a reporter for the Greensburg Daily News.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) was issued on July 16, 1984 and reported at 739 F.2d 1219 (7th Cir. 1984). A copy of the Seventh Circuit's opinion is appended hereto at page A-1.

The Seventh Circuit reversed a judgment of the United States District Court for the Southern District of Indiana (hereinafter District Court), which was issued on September 20, 1983 and reported at 570 F.Supp. 1447 (S.D.Ind. 1983). A copy of the District Court's opinion is appended hereto at page A-12.

## JURISDICTION

The Appellees brought suit in the District Court, seeking a declaratory judgment that Indiana Code §35-34-1-1(d) was repugnant to the First Amendment. The basis for federal jurisdiction is 28 U.S.C. §1331 and 28 U.S.C. §1343(3).

The judgment of the Seventh Circuit sought to be reviewed was entered on July 16, 1984 and is appended hereto at page A-17. The order of the Seventh Circuit denying the timely filed Petition for Rehearing with Suggestion of Rehearing In Banc was entered on August 28, 1984 and is appended hereto at page A-18. This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The Notice of Appeal was filed with the Seventh Circuit on November 14, 1984 and is appended hereto at page A-19.

28 U.S.C. §1254(2) confers jurisdiction of this appeal on this Court.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law...abridging the freedom...of the press;...

Indiana Code §35-34-1-1(d) provides:

> (d) The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

Statutes in other states, similar to Indiana Code §35-34-1-1(d), are appended hereto at pages A-21 to A-29.

## STATEMENT OF THE CASE

This case was presented to the District Court and to the Seventh Circuit upon undisputed facts via cross-motions for summary judgment. The Seventh Circuit held that Indiana Code §35-34-1-1(d) was, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press. A-11.

### Raising the Federal Questions

The parties challenging and defending the Indiana statute in the District Court focused primarily on the issue of whether the state interests advanced were compelling and sufficient to justify the infringement on the First Amendment. The District Court upheld the statute's constitutionality, stating:

> The state has a compelling interest in the effective enforcement of its criminal laws. Indiana Code §35-34-1-1(d) represents a significant contribution to that process in that it allows for the apprehension and prosecution of criminals who would otherwise have avoided arrest. A-15.

Judge Westhafer explicity argued before the Seventh Circuit that protection of the safety of persons and property, via the prevention of flight of accused criminals, protection of witnesses and evidence from harm by the accused before arrest and the location and apprehension of co-defendants, was a compelling state interest justifying the application of the statute in appropriate cases. Seventh Circuit Brief of Honorable John Westhafer, pp. 8-10. However, the Seventh Circuit considered only the State's interest in the apprehension of criminals, which was the only State interest *as applied* to the particular pending charges. A-5. The Seventh Circuit thus considered the federal question relating to whether the State's interest in protecting public safety and health is compelling in this context.

Judge Westhafer also explicitly argued to the Seventh Circuit that balancing the character and likelihood of the harm to the State's administration of justice in the particular pending proceeding against the impact on free and unfettered expression would lead to the result that application of the statute could prevent a "clear and present danger" in some cases, including the particular application under appeal. Seventh Circuit Brief of Honorable John Westhafer, pp. 21-25. The Seventh Circuit held that "the State's fears are remote and speculative." A-11. Despite the additional undisputed evidence that the accused was free in another state (Exhibit 5, Certified Transcript of Probable Cause Hearing; Bass Affidavit No. 2, ¶ 2), and had relatives and friends in Decatur County, Indiana who would read about the criminal charge and could inform the accused before arrest (Bass Affidavit No. 2, ¶ 4), the Seventh Circuit

declared that "(t)he State has not produced any evidence which supports its argument." A-11. The Seventh Circuit thus considered the federal question of whether the statute properly authorizes the use of the contempt power in cases where a clear and present danger exists to the administration of justice.

### Facts Material to Consideration of the Questions Presented

The undisputed facts contained in the Seventh Circuit's opinion below are material, as well as the additional undisputed facts set forth, *supra*.

In Indiana, indirect contempt procedures require the judge issuing the initial order to disqualify himself sua sponte. A rule to show cause or written statement defining the contumacious conduct must be served upon the defendant, and an opportunity to be heard before an impartial tribunal is required to satisfy due process. *Peterson v. State*, (1984) Ind. App., 468 N.E.2d 556, 558 n.1; *Skolnick v. State*, (1979) 180 Ind. App. 352, 388 N.E.2d 1156, *cert. denied*, (1980) 445 U.S. 906, 100 S.Ct. 1085, 63 L.Ed.2d 323.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### 1. The State's Use of Contempt Power Against Press, After Disclosure of a Specific Fact, In Order to Protect the Administration of Justice

The question as to the First Amendment implications of a State statutory authorization for the subsequent use of indirect contempt procedures against the press due to disclosure, before arrest, of the specific fact that a particular sealed criminal charge is in existence or pending is novel and substantial. The full power of the State to protect the administration of justice by use of the contempt power has

been an issue reserved repeatedly by this Court. *Wood v. Georgia*, 370 U.S. 375, 385, n. 8, 82 S.Ct. 1364, 1370, n. 8, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546 (1947). Also, *see Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 557, n. 5, 96 S.Ct. 2791, 2802, n. 5, 49 L.Ed.2d 683 (1976) (majority opinion); 427 U.S. at 594, n. 20, 96 S.Ct. at 2819, n. 20 (Brennan, J., concurring).

This Court's initial analysis in the "clear and present danger" contempt cases has been to determine whether the State legislature had imposed express limitations on the use of the contempt power. If so, a statute like Indiana Code §35-34-1-1(d) is "encased in the armor wrought by prior legislative deliberation" when challenged as repugnant to the Federal Constitution. *Wood v. Georgia, supra; Bridges v. California*, 314 U.S. 252, 260-1, 62 S.Ct. 190, 192, 86 L.Ed. 192 (1941).

The Indiana statute does not attempt to authorize contempt for any editorials, opinions or expressions of public or private concern about the criminal justice system or its participants. The press are always free to publish any other facts, as well as all ideas, opinions or information about the system, the accused, the surrounding circumstances or even the statute's effect on a free press. As soon as the accused is arrested or charges are dismissed, the existence and prior sealing of the charges may be disclosed and discussed without limitation.

There are four (4) basic situations in which the Indiana statute effectively can prevent a "clear and present danger" to the administration of justice, shown either by findings of the trial court or evidence clearly in the record. First, the disclosure of the specific fact that charges are pending before arrest may alert the accused to flee apprehension. Undisputed evidence in the record of this case showed that the accused was free in Kentucky. The accused had relatives and friends living locally in Decatur County, Indiana

who would read the disclosure and could inform the accused before an arrest there could be made. Second, disclosure could induce the accused to harm or tamper with witnesses or evidence relevant to the charges. Third, suspects involved in a large number of crimes may commit further crimes before eventual arrest. This danger may not otherwise be present if the accused is ineligible for release pending trial or is unable to post bail. Fourth, disclosure could hamper location and apprehension of co-defendants. Cf. *United States v. Muse*, 633 F.2d 1041 (2nd Cir. 1980) (en banc), *cert. denied* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981).

These situations are not present in every case when charges are filed. The Indiana legislature has appraised the danger "clear and present" only upon motion of the prosecuting attorney and when the neutral and detached trial court determines that a specific danger actually exists if disclosure occurs, as it would have in this case. Neither Indiana Code §35-34-1-1(d) nor the federal rule relating to the sealing of indictments, Fed. R. Cr. P. 6(e)(4), are explicit about any limits in their application to particular cases, or their need to be supported by findings or evidence in the record. Federal courts have found such implicit limitations in the federal rule[1], and Indiana state courts perhaps would have similarly limited the Indiana statute. The facial invalidation of Indiana Code §35-34-1-1(d) denies any opportunity for such a limiting construction.

This Court's decision on this appeal is important not only to Indiana, but to several other states with similar laws effectively invalidated by the opinion below. Arizona, Florida, Kentucky, Ohio and Oregon have statutes

[1] The opinion below held that "courts have the power to seal indictments or informations, *under appropriate circumstances*, ...." A-6. For an example of specific implicit limitations on Fed. R. Cr. P. 6(e)(4), see *United States v. Watson*, 599 F.2d 1149, 1155 (2nd Cir. 1979), modified on other grounds, *United States v. Muse*, *supra*.

essentially identical to Indiana Code §35-34-1-1(d) in their effect on the press subsequent to the disclosure of charges before arrest. A-21 to A-26. Illinois and North Carolina have enactments which could be interpreted as broadly as their six (6) sister states. A-27 to A-29. Seven (7) other states have ambiguous statutes or rules which are arguably applicable to prohibit press disclosure of sealed criminal charges in appropriate cases.[2]

This appeal concerns the tension between contending values of considerable moment to society. State legislatures and courts need guidance in properly limiting the application of the contempt power against press disclosure of charges before arrest, while protecting the administration of justice in proper cases. This Court's earlier decisions concerning opinions and thoughts need to be clarified in the context of specific facts, since this Court has stated that "(i)t does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation." *Pennekamp v. Florida*, 328 U.S. 331, 346, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946).

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[2] *Cf.* DEL. SUP. CT. CR. R. 6(e); KAN. STAT. §22-3012; ME. R. CR. P. 6(e); MONT. REV. CODES ANN. §95-1409; OHIO R. CR. P. 6(E); R.I. R. CR. P. 6(e); S. D. COMPILED LAWS ANN. §23A-5-16; VT. R. CR. P. 6(f) (each provides that no obligation of secrecy may be imposed except in accordance with this subsection of rule, but *that* subsection of rule contains the dichotomy of prohibiting only participants or court officers from disclosing any matter occurring before the grand jury, while stating that "no person" shall disclose the finding of criminal charges until apprehension of the accused) *with* Fed. R. Cr. P. 6(e)(2) and 6(e)(4); W.VA. R. CR. P. 6(e)(2) and 6(e)(4) (separate subsection of rule listing categories of persons subject to entire rule, which do not include press); also IOWA ACTS §813.2 (Rule 3, No. 4(d)) (listing categories of persons, not including press, in same subsection of rule, followed by "(n)o *such* person shall disclose...").

2. **Whether Protecting Public Safety and Health is a Compelling State Interest Ever Justifying Infringement on First Amendment Freedom of the Press**

The Appellants contend that constitutional review of Indiana Code §35-34-1-1(d) must be governed by the "clear and present danger" standard applicable to a State's use of the contempt power in particular cases. Question 1, *infra*. This Court has agreed, recognizing the distinction between such cases and the exacting scrutiny accorded to prior restraints and self-executing criminal statutes of universal application relating to the publication of truthful information. *Nebraska Press Ass'n. v. Stuart, supra.*

The Seventh Circuit applied both tests, but viewed Indiana Code §35-34-1-1(d) as a criminal statute of universal application. A-3. Therefore, the primary focus of the opinion below was to determine that the State's interest was not compelling and that the statute did not serve such interest by the least restrictive means.

Assuming *arguendo* that the "compelling state interest—no less restrictive means" test is applicable, the initial question is whether protection of public safety and health is a State interest "compelling" enough to justify any application of the statute. There must be situations which would justify some State First Amendment interference, or this Court would have abandoned the test during the past 40 years in favor of a rule that State restrictions on the press relating to pending criminal proceedings are *per se* unconstitutional.

This Court has indicated that the promotion of safety of persons and property is unquestionably at the core of a State's police power. *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 37 L.Ed.2d 708 (1976). In fact, the protection of its citizens may be the primary function of state government. *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 751, n.

12 (7th Cir. 1977). It is difficult to imagine that a State could ever assert a more compelling interest.

This Court recently held that there is a "public safety" exception to the Fifth Amendment requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. *New York v. Quarles*, ___ U.S. ___, 104 S.Ct. 2626, 2632, ___ L.Ed.2d ___ (1984).

Since the formulation of the test for reviewing State infringements on constitutionally protected speech, this Court has rejected several interests as not sufficiently compelling to justify such an infringement. A-7, n. 4. This Court has never upheld any interest asserted, yet continues to indicate that such an interest exists. Without further guidance, implicit encouragement is given to State legislatures to assert untested interests as sufficient to justify First Amendment infringements, while at the same time impeding a State's ability to protect compelling state interests when no less restrictive means are available in a particular case.

When enacting Indiana Code §35-34-1-1(d), the Indiana legislature was aware that a general, self-enacting statute could not determine in a particular case whether less restrictive means are available to protect public safety and health. The Indiana statute can be implemented only via an order in the particular case by a neutral and detached trial court, supported by findings or evidence clearly in the record. Although the statute has not been authoritatively construed by Indiana appellate courts (and cannot be construed due to the opinion below), such findings or evidence can be implied if required by the Federal Constitution. A case-by-case determination of the relevant dangers and less restrictive alternatives to prevent said dangers can be made by a neutral and detached trial court. This determination will keep the statute from abusing the First Amendment freedom of the press, while avoiding substantial social costs exacted by a disclosure's facilitation

of the particular clear and present danger. *See* pages 5-6, *supra.*

As this Court recently stated, albeit in a different context:

> There exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

*United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 3418, ___ L.Ed.2d ___ (1984).

The record shows that Appellees were not held in contempt under the Indiana statute. There has been no showing that the statute has been applied in a widespread manner or for improper purposes.

Much is known about how an asserted State interest can fail this Court's test relating to regulation of constitutionally protected speech, but nothing is known about enacting a statute that will receive a passing grade. Several States have enactments concerning the same specific fact involved in pending judicial proceedings—the existence of criminal charges before arrest. A-21 to A-29. This indicates that an important problem exists for State criminal justice systems, and a need to deal with this problem.

Indiana Code §35-34-1-1(d) serves a compelling state interest, the protection of public safety and health, and can be applied by trial courts in such a manner that no less restrictive means would be available to serve said interest in the particular case. This presents a novel and substantial question for this Court, affecting Indiana and other states with similar statutes. This appeal also could serve the novel and substantial function of guiding States to more delicately and accurately protect freedom of the press and core needs of their criminal justice system.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated:
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# Appendix

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 83-2851

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN MCKINLEY,

*Plaintiffs-Appellants,*

*v.*

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court, Judge, and KENNETH BASS, Decatur County Prosecutor,

*Defendants-Appellees.*

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Appeal from the United States District Court for the Southern District of Indiana.
**S. Hugh Dillin,** *Judge.*

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ARGUED APRIL 3, 1984—DECIDED JULY 16, 1984

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Before WOOD and FLAUM, *Circuit Judges,* and GIBSON, *Senior Circuit Judge.**

GIBSON, *Senior Circuit Judge.* The plaintiffs, Worrell Newspapers and Karen McKinley, appeal from the district court's denial of their motion for summary judgment, and the district court's grant of the defendants', the Honorable

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

John Westhafer and Kenneth Bass, motion for summary judgment. We reverse.

I. Facts

On November 4, 1982, Karen McKinley, a reporter for the Greensburg Daily News, was informed by a confidential source that a criminal information would be filed that morning by the Decatur County Prosecutor, Kenneth Bass, in connection with an arson investigation. McKinley went to the County Clerk's Office to look at the court records in order to confirm the suspect's name, that a probable cause hearing had been held, and to learn the details of the charge. The employees in the office would not allow McKinley to look at the criminal docket book, and they also denied her access to all records relating to the criminal information involved.

McKinley then went to see John Westhafer, Judge of the Decatur County Circuit Court, and asked him why she was being denied access to these records. The Judge responded that he had granted the County Prosecutor's motion to seal the information until the suspect was arrested. The motion had been granted pursuant to an Indiana statute which punishes by contempt anyone who discloses the name contained in a sealed information before the suspect is arrested. *Ind. Code Ann.* § 35-34-1-1 (d) (Burns Cum. Supp. 1984). McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the information. The Judge told McKinley that she and her editor would be held in contempt if the newspaper published a story about the information before the criminal suspect was arrested.

McKinley returned to the newspaper and related these events to her editor. Because of the possible contempt sanction, the paper did not print any story on November 4 about the sealed information. On November 5, the newspaper was informed that the individual named in the sealed information had been arrested, and the paper published an article concerning the information and arrest in its

evening edition. All parties agree, and the district court found, that but for § 35-34-1-1(d) and Judge Westhafer's statement to McKinley, the plaintiffs would have published an article reporting the existence of the information, and the individual it named, on November 4.

The plaintiffs brought this action in federal district court seeking a declaratory judgment that § 35-34-1-1(d) is unconstitutional because it violates the rights of freedom of speech and the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. There was no dispute over the facts and so the case was submitted to the court on cross-motions for summary judgment. Although the district court acknowledged that the Indiana statute infringed upon the right of freedom of the press guaranteed by the First Amendment, it held that the State's interest in the apprehension of criminals was sufficiently compelling to overcome the constitutional infirmity, and the statute was narrowly tailored to serve that interest in the manner least restrictive of a free press.

## II. Discussion

The only issue before us concerns the authority of a state to subject to criminal punishment any person who truthfully publishes the name of an individual against whom a sealed criminal indictment or information has been filed. Because we hold that § 35-34-1-1(d) is, on its face, an unconstitutional infringement on the First Amendment, we do not reach the other issues raised by the plaintiffs.

§ 35-34-1-1(d) provides as follows:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any per-

> son may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as contempt.

It is clear that the statute applies to the press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." *U.S. Const.* amend. I. Through the Fourteenth Amendment, this prohibition applies equally to the states. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Near v. Minnesota*, 283 U.S. 697, 707 (1931). Despite the unequivocal language of the First Amendment, its freedoms are not absolute. *Near*, 283 U.S. at 708. The authority of a state to enact laws to promote the health, safety, and general welfare of its people must be acknowledged, *id.* at 707, and accommodated by constitutional jurisprudence. However, when a state statute infringes upon constitutional guarantees, the interest which the state seeks to secure must be compelling. In *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979), the Supreme Court held as follows:

> Whether we view the statute [forbidding publication of an alleged juvenile delinquent's name] as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. *See Nebraska Press Assn. v. Stuart, supra*, at 561; *Organization for a Better Austin v. Keefe, supra*, at 419; *Near v. Minnesota ex rel. Olson, supra*, at 716. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).
>
> . . .
>
> Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.

*Id.* at 101-02. Also, "the burden is on the government to show the existence of such an interest." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), *citing Elrod*

*v. Burns*, 427 U.S. 347, 362 (1976). Further, the interest cannot be pursued by means which broadly stifle fundamental liberties when the end can be more narrowly achieved. In other words, the state must use the least restrictive means for achieving its purpose. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, ..... U.S. ....., ....., 75 L.Ed.2d 295, 305 n.7 (1983); *Bellotti*, 435 U.S. at 786. In addition, there is a "heavy presumption" against the constitutional validity of a statute which infringes upon First Amendment guarantees. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

The State argues that these standards are not applicable because § 35-34-1-1(d) is not a "prior restraint" on the press, but rather provides a subsequent punishment for violation of its terms. This is a distinction without a difference, and the Supreme Court recently eliminated this semantic distinction. *Daily Mail*, 443 U.S. at 101-02; *see also Thornhill*, 310 U.S. at 101-02 ("The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.") Indeed, as the Court went on to note, "state action to punish publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 443 U.S. at 102.

We consider only one of the interests which the State tenders, and characterizes as compelling, as a justification for the statute.[1] The interest boils down to the State's interest in the apprehension of criminals.

---

[1] The State also tenders as justification its interest in protecting citizens who may be witnesses in a criminal proceeding brought against an individual named in an indictment. However, the State failed to develop this argument sufficiently to warrant our consideration of it as a separate issue. Further, we note the possibility that these interests may vary from case to case because the statute does not specify which state interests are to be served.

We agree that courts have the power to seal indictments or informations, under appropriate circumstances, to facilitate the apprehension of criminals. *See generally, United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 984 (1981); *United States v. Slochowsky*, 575 F. Supp. 1562 (E.D.N.Y. 1983). For federal courts, Rule 6(e)(4) of the Federal Rules of Criminal Procedure formally embodies this judicial power.[2] Rule 6(e)(2) contains a general provision for secrecy in order to give effect to and protect sealed records.[3] The obvious purpose behind these provisions is to "prevent the requirement of an indictment from serving as public notice that would enable the defendant to avoid arrest." *Muse*, 633 F.2d at 1043. However, unlike § 35-34-1-1(d), the secrecy provision in Rule 6(e) applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their positions in the criminal justice system. *See* note 3, *supra*; *see also Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 870 n.33 (D.C. Cir. 1981). Indeed, a federal district court has held recently that if Rule 6(e) was construed to apply to witnesses who testify before

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[2] Fed. R. Crim. P. 6(e)(4) provides as follows:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

[3] Fed. R. Crim. P. 6(e)(2) provides as follows:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under [this Rule] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

grand juries it would violate the First Amendment. *In re Grand Jury Proceedings*, 558 F. Supp. 532, 534-35 (W.D.Va. 1983). Thus, while we recognize the State's interest in apprehending criminals, we do not think it is sufficiently compelling to justify the prohibition of publication by *any* person, including members of the press, of the contents of a sealed document, mandated by § 35-34-1-1(d).

The Supreme Court has recognized that infringement upon First Amendment freedoms may be justified, but only in exceptional cases: when the country is at war, when a sovereign seeks to protect the primary requirements of decency by prohibiting obscenity, and when the security of community life is threatened by incitements to acts of violence and the overthrow by force of an orderly government. *Near*, 283 U.S. at 716. Even the country's interest in national security must bend to the dictates of the First Amendment. *See New York Times Co. v. Sullivan*, 403 U.S. 713, 714 (1971) (*per curiam*).[4] In-

[4] Indeed, the Supreme Court has rejected several interests as not sufficiently compelling to justify an infringement on the First Amendment. *See e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, ..... U.S. ....., 75 L.Ed.2d 295 (1983) (a state's interest in raising revenue); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (a state's interest in preserving the anonymity of its juvenile offenders); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (a state's interest in preserving the integrity of its judiciary); *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308 (1977) (a state's interest in preserving the anonymity of its juvenile offenders); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (a state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (a state's interest in preserving the anonymity of victims of sexual assault and the right of privacy); *Craig v. Harney*, 331 U.S. 367 (1947) (a state's interest in protecting the integrity of the judiciary); *Near v. Minnesota*, 283 U.S. 697 (1931) (a state's interest in preserving the integrity of public office).

*But see Seattle Times Co. v. Rinehart*, ..... U.S. ....., 52 U.S.L.W. 4612, 4613-14, 4617 (1984) (A newspaper was the defendant in a

(Footnote continued on following page)

diana's asserted interest does not reach the level of these concerns. We conclude that the publication Indiana seeks to punish under § 35-34-1-1(d) lies "near the core of the First Amendment," and the interest advanced by the threatened "imposition of criminal sanctions [is] insufficient to justify the actual and potential encroachments on freedom of . . . the press which follow therefrom." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

Thus, we necessarily hold that § 35-34-1-1(d) is overbroad; the State could have utilized less restrictive means to achieve its purpose. The predecessor to § 35-34-1-1(d)[5] applied only to grand jurors, complainants, prosecutors, clerks, and judges. The State argues that the fact that the old law was replaced is evidence that it was ineffective. However, the State could have made its law applicable to a wider range of people without running afoul of the First Amendment. We note that the "secrecy" provision of Rule 6(e) applies to *all* people who, by virtue of their positions in the criminal justice system, might be aware of the information contained in a sealed document.

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[4] *continued*
civil action. It moved to compel discovery of certain documents. The trial court granted this motion, but also granted plaintiff's motion for a protective order to prevent dissemination and publication of information obtained under the order to compel. The Court affirmed the power of a district court to grant a protective order even where First Amendment concerns are involved. The Court held that where "a protective order is entered on a showing of good cause as required by [*Fed. R. Civ. P.*] 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained by other sources, it does not offend the First Amendment.")

[5] *Ind. Code Ann.* § 35-3.1-1(e) (Burns 1978), provided in pertinent part as follows:

> No complainant, if the charge be by information and no grand juror, if the charge be by indictment, and no prosecuting attorney, clerk, judge, or other officer shall disclose the fact that an indictment or information charging a defendant with an offense is pending until the defendant has been arrested or otherwise brought within the custody of the court . . . .

The State could have adopted this middle ground. Alternatively, the State could have chosen to adopt careful internal procedures to protect, when necessary, the confidentiality of a criminal information. *See Landmark*, 435 U.S. at 845.

The State also argues that § 35-34-1-1(d) imposes simply an "incidental" restriction on freedom of the press because, in this case, publication was not prohibited but only postponed for one day. This same argument was disposed of in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), as follows:

> Of course, the order at issue . . . does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there is often a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.
>
> "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."

*Id.* at 560, *quoting, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

The State's "postponement" argument must fail for another reason as well. It is undisputed that this information was related to a larger, allegedly criminal, event which was of great public interest.[6] The Supreme Court

[6] On November 2, election day, a deputy sheriff who was a candidate for the office of sheriff was suspended from his duties pend-

(Footnote continued on following page)

has noted that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 492 (1975); *see also Thornhill*, 310 U.S. at 101-02.

Undisputably, courts may seal criminal informations as well as other documents. However, when the press, by whatever means, obtains the information contained in a court-sealed document, a state cannot prohibit the publication of the information without violating the First Amendment. *See Daily Mail*, 443 U.S. at 103-04 ("Here, respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information.") "An untrammeled press is a vital source of public information . . . and an informed public is the essence of a working democracy." *Minneapolis Star & Tribune*, ..... U.S. at ....., 75 L.Ed.2d at 305, *quoting*, *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936).

Finally, the State argues that the possible flight of indictees who have read about their indictments in the newspaper constitutes a "clear and present danger" to the State's interest in apprehending criminals. In *Landmark Communications*, the Supreme Court summarized the requirements of the "clear and present danger" standard as follows:

> In a series of cases raising the question of whether the contempt power could be used to punish out-of-

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[6] *continued*
ing a criminal investigation. The deputy lost the election. Officials refused to disclose the nature of the criminal investigation. On November 4, a criminal information was filed, against the individual named in the sealed indictment at issue here, as the result of a public probable cause hearing during which there was testimony that the deputy sheriff had been involved in arson.

> court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. *Bridges v. California*, [314 U.S. 252 (1941)]; *Pennekamp v. Florida*, [328 U.S. 331 (1946)]; *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California, supra* at 263, and that a "solidity of evidence," *Pennekamp v. Florida, supra* at 347, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney, supra* at 376.

435 U.S. at 844-45.

The State has not met this standard. To the contrary, the State has not produced any evidence which supports its argument. Further, the language of the statute does not limit its applicability to those situations which do present a "clear and present danger." At best the State's fears are remote and speculative. This degree of danger is insufficient to warrant an infringement on the First Amendment.

Thus, we hold that § 35-34-1-1(d) is, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press. Accordingly, the district court judgment is reversed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA 40227—Midwest Law Printing Co., Inc., Chicago—7-16-84—400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg News, KAREN MCKINLEY, | ) | |
| *Plaintiffs,* | ) | |
| -vs- | ) | NO. IP 83-32-C |
| HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, KENNETH BASS, Decatur County Prosecuting Attorney, | ) | |
| *Defendants.* | ) | |

## ENTRY

This case comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated below, defendants' motion is granted; plaintiffs' motion is denied.

### Facts

On the morning of November 4, 1982, Karen McKinley, a reporter for the Greensburg Daily News, was informed by a confidential source that a criminal information would be filed that morning by the Decatur County Prosecutor, Kenneth Bass, in connection with an arson investigation. The source named Patrick Schoettmer as the subject of the charges.

Later that morning, McKinley went to the Decatur County Clerk's office to look at the court records in order to confirm Schoettmer's name, that a probable cause hearing had been held, and to learn the details of the charges. However, the employees in the Clerk's office would not allow McKinley to look at the criminal docket book and denied her access to all records relating to the information.

McKinley then went to see John Westhafer, Judge of the Decatur County Circuit Court, and asked him why she was being denied access to the records relating to the information filed against Schoettmer. Judge Westhafer responded that he had granted the motion of Prosecutor Bass that the information be sealed until Schoettmer was taken into custody. The motion to seal the information was granted pursuant to Ind. Code 35-34-1-1(d) (1982), which provides:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the information filed against Schoettmer. Judge Westhafer told McKinley that she and her editor would be held in contempt if the newspaper published a story concerning the Schoettmer information prior to Schoettmer's arrest.

McKinley then returned to the Greensburg Daily News and told her editor, John Murphy, of her conversation with Judge Westhafer. McKinley and Murphy feared being held in contempt if any article concerning the Schoettmer information or its sealing were published. Therefore, no

such article was published on November 4, 1982. On November 5, the Greensburg Daily News was informed that Schoettmer had been arrested. The newspaper then published an article concerning the information and arrest in its evening paper. But for Judge Westhafer's statements to McKinley and Ind. Code 35-34-1-1(d), plaintiffs would have published an article reporting the existence of the information on November 4.

Plaintiffs seek a declaratory judgment that Ind. Code 35-34-1-1(d) is unconstitutional, both on its face and as applied to plaintiffs because it violates plaintiffs' rights of freedom of speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

**Discussion**

Whether we view Ind. Code 35-34-1-1(d) as a prior restraint upon the press or as a penal sanction for disclosing lawfully obtained, truthful information is not dispositive: in either case, the highest form of state interest is required to sustain the statute's validity. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976): *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1367 (1931).

Indiana Code 35-34-1-1(d) will therefore pass constitutional muster if it, first, satisfies a state interest of the highest order and, second, is narrowly tailored to serve that interest in the manner least restrictive of a free press. *Globe Newspaper Co. v. Superior Court*, ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

We think that Ind. Code 35-34-1-1(d) meets these two re-

quirements. The obvious purpose of the statute is to facilitate the apprehension of criminal suspects by reducing the risk of flight. The state has a compelling interest in the effective enforcement of its criminal laws. Indiana Code 35-34-1-1(d) represents a significant contribution to that process in that it allows for the apprehension and prosecution of criminals who would otherwise have avoided arrest.

In addition, Ind. Code 35-34-1-1(d) is drafted no more broadly than necessary to serve this state interest. A criminal suspect who is disposed to flee to avoid prosecution will do so whether he is forewarned of impending prosecution by a source in the county clerk's office or by the evening newspaper. In certain cases, this result is avoidable only if the suspect is taken completely unaware of prosecution. It is therefore necessary for the state to prohibit disclosure by "any person" instead of restricting the statute's scope to court personnel and others closely associated with the judicial process.

The fact that Ind. Code 35-34-1-1(d) does not require the Court to make findings on the record to justify its order to seal does not represent a constitutional infirmity. If a third party with standing to sue, such as plaintiffs in this case, wishes to challenge a particular seal order as an unconstitutional application of Ind. Code 35-34-1-1(d), the absence of findings on the record is certainly not an obstacle. The fact that the Court granted the motion to seal is tantamount to a finding that the suspect was likely to flee if forewarned of the indictment or information. A reviewing court will scrutinize the record of the probable cause hearing to determine whether facts were elicited to support the court's decision to seal the indictment or information.

Plaintiffs speculate that Ind. Code 35-34-1-1(d) could give rise to abuses because it does not provide for the expiration of the seal order in cases where the suspect is not apprehended within a reasonable time. Any provision

allowing for secrecy in government has potential for abuse. We are convinced, however, that the potential for abuse of Ind. Code 35-34-1-1(d) is far outweighed by the statute's salutary effects.

Accordingly, we find Ind. Code 35-34-1-1(d) constitutional both on its face and as applied to the facts of this case.

Dated this 20 day of September, 1983.

/s/ S. Hugh Dillin

S. Hugh Dillin, Judge



BEST

Opinion by Judge Gibson

JUDGMENT – ORAL ARGUMENT

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604 10

July 16, 1984

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FLOYD R. GIBSON, Senior Circuit Judge*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg News, and KAREN McKINLEY,
Plaintiffs-Appellants,
No. 83-2851
vs.
HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecuting Attorney,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83 C 32
Judge S. Hugh Dillin

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.



AVAILABLE COPY

# United States Court of Appeals

**For the Seventh Circuit**

**Chicago, Illinois 60604**

August 28, 1984

**Before**

**Hon.** HARLINGTON WOOD, JR., Circuit Judge

**Hon.** JOEL M. FLAUM, Circuit Judge

**Hon.** FLOYD R. GIBSON, Senior Circuit Judge*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,
Plaintiffs-Appellants.

**No.** 83-2851 **vs.**

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,
Defendants-Appellees.

Appeal from the United State. District Court for the Southern District of Indiana. Indianapolis Division
No. IP 83-32-C
S. Hugh Dillin, Judge

## O R D E R

On July 30, 1984, defendants-appellees filed a petition for rehearing with suggestion of rehearing in banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing in banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eight Circuit, sitting by designation.



BEST AVAI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RECEIVED
1984
CLERK

No. 83-2851

| | | |
|---|---|---|
| WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY, | ) | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division |
| Appellants (Plaintiffs Below), | ) | |
| v. | ) | |
| HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor, | ) | The Honorable S. Hugh Dillin, District Judge |
| Appellees (Defendants Below). | ) | |

NOTICE OF APPEAL

Notice is hereby given that Honorable John Westhafer and Kenneth Bass, Defendants-Appellees named above, hereby appeal the entire judgment of this Court entered in this cause on July 16, 1984, which held that Indiana Code § 35-34-1-1(d) is, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press.



LABLE COPY

The statute under which the appeal of the Defendants-Appellees to the United States Supreme Court is taken is 28 U.S.C. § 1254 (2).

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

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Deputy Attorney General

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## ARIZ. REV. STAT. §13-2813

A. A person commits unlawful disclosure of an indictment, information or complaint if, except in the proper discharge of his official duties or as authorized by the court, such person knowingly discloses the fact that an indictment, information or complaint has been found or filed before the accused person is in custody or has been served with a summons.

B. Unlawful disclosure of an indictment, information or complaint is a class 2 misdemeanor.

## FLA. STAT. §905.27

(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to

communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.083, or by fine not exceeding $5,000, or both.

(5) A violation of this section shall constitute criminal contempt of court.

## KENTUCKY RULES OF CRIMINAL PROCEDURE, RULE 5.24

(1) Subject to the right of a person indicted to procure a transcript or recording as provided by Rule 5.16(3), and subject to the authority of the court at any time to direct otherwise, all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret, except that counsel may divulge such information as may be necessary in preparing the case for trial or other disposition.

(2) The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, in which event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(3) A violation of this Rule 5.24 shall be punishable as a contempt of court.

## OHIO REV. CODE ANN. §2939.18

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

## OREGON REV. STAT. §132.420

No grand juror, reporter or other person except the district attorney or a peace officer in the exercise of his duties in effecting an arrest shall disclose any fact concerning any indictment while it is not subject to public inspection.

## OREGON REV. STAT. §132.990

Violation of ORS 132.420 or the prohibitions of ORS 132.410 is punishable as contempt.

(a) Only the State's Attorney, his reporter and any other person authorized by the court or by law may attend the sessions of the Grand Jury. Only the grand jurors shall be present during the deliberations and vote of the Grand Jury. If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court shall appoint such reporter.

(b) Matters other than the deliberations and vote of any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs. The court may direct that a Bill of Indictment be kept secret until the defendant is in custody or has given bail and in either event the clerk shall seal the Bill of Indictment and no person shall disclose the finding of the Bill of Indictment except when necessary for the issuance and execution of a warrant. Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection or Section 112-7 is in contempt of court, subject to proceedings in accordance to law.

## N.C. GEN. STAT. §15A-623

(a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury.

(b) The foreman presides over all hearings and has the power to administer oaths or affirmations to all witnesses.

(c) The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

(d) During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to a witness being examined, may, as the occasion requires, also be present:

(1) An interpreter, if needed.
(2) A law-enforcement officer holding a witness in custody.

Any person other than a witness who is permitted in the grand jury room must first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

(f) The presiding judge may direct that a bill of indictment be kept secret until the defendant is arrested or appears before the court. The clerk must seal the bill of indictment and no person including a witness may disclose the finding of the bill of indictment, or the proceedings

leading to the finding, except when necessary for the issuance and execution of an order of arrest.

(g) Any grand juror or other person authorized to attend sessions of the grand jury and bound to keep its secrets who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this section is in contempt of court and subject to proceedings in accordance with law.

(3)

No. 84-827

FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,

*Appellants,*

*v.*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## MOTION TO AFFIRM

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## QUESTIONS PRESENTED

1. Whether IND. CODE § 35-34-1-1(d) (1982) is unconstitutionally overbroad under the First and Fourteenth Amendments of the Constitution of the United States in providing a penal sanction against the press for truthful publication of constitutionally protected speech.

2. Whether IND. CODE § 35-34-1-1(d) (1982) is unconstitutional under the First and Fourteenth Amendments in providing for a prior restraint on truthful publication of constitutionally protected speech.

3. Whether IND. CODE § 35-34-1-1(d) (1982) unconstitutionally denies First and Fourteenth Amendment rights of access to governmental information.

## Rule 28.1 Statement

Appellee Worrell Newspapers of Indiana, Inc. is a wholly-owned subsidiary of Worrell Newspapers, Inc. Worrell Newspapers of Indiana, Inc. has no subsidiaries or affiliates.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,

*Appellants,*

*v.*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees move that the judgment of the Court of Appeals be affirmed because the question decided by that court is controlled by numerous decisions of this Supreme Court. The appeal is therefore so insubstantial as not to warrant further argument.

## STATEMENT OF THE CASE

Appellee Worrell Newspapers of Indiana, Inc. publishes the Greensburg Daily News, a daily newspaper in the city of Greensburg in Decatur County, Indiana. Appellee Karen McKinley ("McKinley") is a reporter for the Greensburg Daily News. Appellant Honorable John Westhafer ("Judge Westhafer") is the Judge of the Circuit Court for Decatur County, Indiana, and appellant Kenneth Bass ("Prosecutor Bass") is the Decatur County Prosecuting Attorney.

Worrell Newspapers and McKinley commenced this action pursuant to 42 U.S.C. § 1983, alleging that IND. CODE § 35-34-1-1(d) (1982) is unconstitutional under the First and Fourteenth Amendments. The complaint sought a declaratory judgment that the statute is unconstitutional, and did not seek an award of damages, injunctive relief or attorney's fees against the appellants. The District Court upheld the statute but the Court of Appeals unanimously reversed, holding it unconstitutionally overbroad under the First Amendment in providing a penal sanction against the press for publication of constitutionally protected speech. Jurisdictional Statement at 1, Appendix at A-1—A-16. The case was presented to the courts below on the parties' cross-motions for summary judgment, and the facts are not in dispute.

The statutory provision held unconstitutional by the Court of Appeals became effective on September 1, 1982, some two months before the events involved. Pub. L. No. 298 §§ 3, 10, 1981 IND. ACTS at 2350-51, 2392. It provides that:

> The court, upon motion of the prosecuting attorney, may order that [an] indictment or information be sealed. If a court has sealed an indictment or information, *no person* may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. . . . A violation of this subsection is punishable as a contempt.

IND. CODE § 35-34-1-1(d) (1982) (emphasis added). By contrast, the former Indiana statute, which § 35-34-1-1(d) was

enacted to replace, had imposed the obligation of secrecy upon and made subject to the contempt sanction only those persons necessarily privy to the fact that criminal charges had been filed:

> No *complainant,* if the charge be by information and no *grand juror,* if the charge be by indictment, and no *prosecuting attorney, clerk, judge, or other officer* shall disclose the fact that an indictment or information charging a defendant with an offense is pending until the defendant has been arrested or otherwise brought within the custody of the court if the court, upon motion of the prosecuting attorney, within its discretion orders that the indictment or information be sealed . . . . A violation of this subsection is punishable as a contempt.

IND. CODE ANN. § 35-3.1-1(e) (Burns 1979) (emphasis added).

On election day, November 2, 1982, the Decatur County Sheriff publicly announced that Ron Martin, a Decatur County Deputy Sheriff and the Republican candidate for election to the office of Decatur County Sheriff, had been suspended from his employment as deputy sheriff. The next day, November 3, 1982, the Greensburg Daily News published on its front page a lengthy article authored by McKinley concerning Deputy Martin's suspension. McKinley's article said that officials would not confirm that Deputy Martin's suspension was related to an arson investigation which had previously resulted in one arrest and "would not say if criminal charges are pending against Martin," but that a deputy prosecutor had said "other arrests may be pending in the case . . . ." The article further stated that the "Daily News has learned . . . that the suspension of Deputy Martin is in some way connected to a fire . . . which reportedly destroyed a semi-truck owned by Martin;" and that "the decision to seek [Martin's] suspension . . . was not made until Indiana State Police investigator George Peck and city police department Capt. Bob Clark made a hurried trip to Kentucky to talk with a former Decatur County resident, a fact confirmed by the prosecutor's office today."

On the same day, the Greensburg Daily News also published a front page article concerning the election results of the Decatur County Sheriff's race. The article stated that Deputy Martin was the Republican candidate, that he had been defeated "by 803 votes or 8.83 percent of the total," and that while Martin's opponent "probably would have been elected . . . anyway," the election day announcement of Martin's suspension as Deputy Sheriff "may have changed a few votes."

On the morning of the following day, November 4, 1982, a confidential source informed McKinley that a criminal information would be filed that morning in connection with the arson investigation that had led to Deputy Martin's suspension. The source informed McKinley that the charges would be filed against Patrick Schoettmer, the "former Decatur County resident" mentioned in her November 3, 1982 article.

The same morning, Prosecutor Bass filed a criminal information against Patrick Schoettmer in connection with the arson investigation that had led to Deputy Martin's suspension. A probable cause hearing on the criminal information was held that morning in open court before Judge Westhafer, during which there was testimony that (1) Schoettmer had been questioned at Fort Knox, Kentucky, by Indiana police officers and had admitted his involvement in the arson; (2) several of Schoettmer's relatives had also been questioned by police officers and had also said he was involved in the arson; and (3) a witness had said Deputy Martin paid him and Schoettmer to commit the arson. Judge Westhafer then ordered that a warrant be issued for Schoettmer's arrest. After the hearing, Prosecutor Bass moved that Judge Westhafer order that the criminal information be sealed pending Schoettmer's arrest, and Judge Westhafer ordered it sealed pursuant to IND. CODE § 35-34-1-1(d).

That same morning, McKinley went to the Decatur County Clerk's office to look at the court records in order to confirm Schoettmer's name and to learn the details of the charges. The employees in the Clerk's office would not allow McKinley to

look in the criminal docket book and denied her access to the records relating to the criminal information and Judge Westhafer's order that the information be sealed. McKinley then went to see Judge Westhafer and asked him why she was being denied access to the records relating to the information filed against Schoettmer. Judge Westhafer told McKinley that he had ordered it sealed until Schoettmer was taken into custody.

McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the charges filed against Schoettmer. Judge Westhafer told McKinley that she and her editor would be held in contempt if the newspaper published the story. Prosecutor Bass was also present during part of McKinley's conversation with Judge Westhafer. Judge Westhafer and Prosecutor Bass showed McKinley a copy of IND. CODE § 35-34-1-1(d) (1982), and told McKinley that if any person disclosed the fact that a sealed information existed, that person would be subject to a contempt hearing.

McKinley then returned to the Greensburg Daily News and told her editor, John Murphy, of her meeting with Judge Westhafer. Because Murphy and McKinley feared being held in contempt if any article concerning the Schoettmer information or its sealing were published, no article was published on November 4, 1982. But for Judge Westhafer's statements to McKinley and the provisions of IND. CODE § 35-34-1-1(d), such an article would have been published in the Greensburg Daily News on that day.

Later that day, editor Murphy went to see Judge Westhafer. Judge Westhafer told Murphy that if the newspaper published any information that criminal charges had been filed and sealed before Schoettmer was arrested, "it would be going against [his seal] order and the statute would apply." Judge Westhafer told Murphy it made no difference that the newspaper had learned of the charges against Schoettmer independently rather than from the court records, and reiterated that if a story were published, "the statute would apply."

## ARGUMENT

### I. The Court of Appeals Decision Is Clearly Mandated By This Court's Decisions Proscribing Penal Sanctions Against The Press For Truthful Publication of Constitutionally Protected Speech.

IND. CODE § 35-34-1-1(d) forbids truthful publication by the press. It provides that if a criminal indictment or information is ordered sealed, "no person" may disclose the fact that it is in existence until the defendant is arrested, and that any violation of that statutory prohibition "is punishable as a contempt." The obligation of secrecy and contempt sanction are not limited to governmental officials or other persons necessarily privy to the fact that criminal charges have been filed, but rather forbid speech and publication by any person who learns of the fact by any means.

The statute applies to members of the general public and the press whether they learn of the indictment or information before or after it is filed and ordered sealed. It applies to them whether they learn of the charges through a disclosure by a governmental official, a complainant or grand juror, through attendance at open court proceedings, through interviews with persons contacted by police officials attempting to arrest the defendant, or by any other means. The only exception is for "any disclosure necessarily incident to the arrest of the defendant." IND. CODE § 35-34-1-1(d) (1982).

In this case, the press learned of the Schoettmer information before it was filed and by means independent of the court records. Through McKinley's meeting with Judge Westhafer and Prosecutor Bass, appellees' knowledge of the information was confirmed and they further learned that Judge Westhafer had ordered it sealed. Nevertheless, the statute's prohibition on disclosure forbade publication of the facts that an information had been filed against Patrick Schoettmer, that criminal charges had been filed in connection with the arson investigation that had led to Deputy Martin's suspension, or even that a criminal information had been ordered sealed.

In forbidding truthful publication by the press and providing for punishment by contempt if that command is violated, § 35-34-1-1(d) patently violates the First Amendment under this Court's decisions. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the defendant newspaper challenged the constitutionality of a state statute making it a misdemeanor to publish the name of a juvenile offender without court approval. The newspaper argued that the statute was an unconstitutional prior restraint, but this Court found it unnecessary to reach that issue. *Id.* at 100-01. Rather, because the statute provided punishment for the truthful publication of lawfully obtained information, the Court applied essentially the same First Amendment standards that apply to prior restraints. *Id.* at 101-105. It held that the State's interest in "protect[ing] the anonymity of the juvenile offender [to] . . . further his rehabilitation" was "not sufficient to justify application of a criminal penalty to [the newspaper's truthful publication]." *Id.* at 104.

Likewise, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), this Court held violative of the First Amendment a state statute making it a misdemeanor for the press to publish information regarding confidential proceedings before a judicial disciplinary commission. The Court held that the State's interests in promoting and facilitating the effectiveness of the disciplinary commission, including encouraging the filing of complaints and willing participation of witness, *id.* at 835-36, and avoiding unjustified injury to judicial reputations, *id.* at 840-842, were "insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow [from punishing publication of truthful information]." *Id.* at 838.

These decisions clearly mandate the result reached by the Court of Appeals. In a case presenting the identical state interests involved here, for example, the Florida Supreme Court invalidated a statute making it a crime to publish the name of a person subject to a wiretap order until an indictment or

information was brought. *Gardner v. Bradenton Herald, Inc.*, 413 So.2d 10 (Fla.), *cert. denied*, 459 U.S. 865 (1982). On the authority of *Daily Mail* and *Landmark Communications*, the court held the statute an unconstitutional restraint on the publication of truthful information. 413 So.2d at 11-12.

Under *Landmark Communications* and *Daily Mail Publishing*, § 35-34-1-1(d) reaches too broadly in punishing truthful publication by the press, as the Court of Appeals held. This Court's First Amendment overbreadth analysis requires that statutes infringing upon First Amendment rights be narrowly tailored, *e.g., Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960), and it is apparent that less drastic and more narrowly tailored means are available to serve the State's purposes. For example, the predecessor statute limited the obligation not to disclose the existence of a sealed indictment or information to those persons necessarily privy to knowledge of it, without restraining or punishing speech or publication by the press or members of the general public. IND. CODE ANN. § 35-3.1-1(e) (Burns 1979). In addition, the State could adopt more careful internal procedures to protect confidential information. *See, e.g., Landmark Communications*, 435 U.S. at 845.

Appellants contended below that such less drastic means may not achieve the State's objectives in circumstances where the information is nevertheless obtained by the press. Under this Court's precedents, however, "because a statute is overbroad [in applying to protected speech] . . . government *must* make use of less drastic means if it would regulate at all—*whatever* substantive reduction in efficacy a less drastic means might entail." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-30 at 722 (1978) (emphasis in original).

*Landmark Communications* held that the State was *required* to limit punishment for disclosure of confidential information to participants in the disciplinary proceedings. *See* 435 U.S. at 841 & n.12. Although such means would not serve the government's interests *as perfectly* as the broader rule where, as there, the press does obtain the information, this Court held the

State's statute invalid because "*much* of the risk" could be avoided "through careful internal procedures . . . ." *Id.* at 845 (emphasis added). Similarly, *Daily Mail Publishing* held that the government was limited to use of other means, such as voluntary cooperation between the press and court, to serve its interests, 443 U.S. at 105 & n.3, even though such means would not work *as perfectly* as the broader rule punishing a newspaper for truthful publication.

The fact that neither the Federal Government nor most other States have found it necessary to punish the press for publication of such information demonstrates that such less drastic means are feasible. *Cf., Landmark Communications,* 435 U.S. at 841 & n.12 ("more than 40 States" had not found it necessary to punish publication by the press); *Daily Mail Publishing,* 443 U.S. at 105 & n.2 ("only 5 [States] . . . impose criminal penalties on nonparties for publication"). As the Court of Appeals observed, Fed. R. Crim. P. 6(e)(2),(4) provides for the sealing of indictments but limits the obligation of secrecy and the class of persons subject to punishment by contempt to "[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or [other governmental personnel] to whom disclosure is made under [this Rule]." Similarly, States with rules or statutes modeled on Fed. R. Crim. P. 6 limit the secrecy obligation to persons who are privy to the information due to their relationship with the grand jury. *See, e.g.,* Del. Sup. Ct. Cr. R. 6(e); ILL. ANN. STAT. ch. 38, § 112-6; KAN. STAT. ANN. § 22-3012; Me. R. Cr. P. 6(e); MONT. CODE ANN. § 95-1409; N.C. GEN. STAT. § 15A-623(g); R. I. Sup. Ct. Crim. R. 6(e); S.D. CODIFIED LAWS ANN. § 23A-5-16 (Rule 6(e)); Vt. R. Cr. P. 6(f); W. Va. R. Cr. P. 6(e)(4).[1]

[1] Of the other state statutes and rules claimed by appellants to be comparable to IND CODE § 35-34-1-1(d), *see* Jurisdictional Statement Appendix at A-21—A-29, some plainly do not punish disclosures by

*(Footnote continued on following page)*

The Court of Appeals decision holding IND. CODE § 35-34-1-1(d) invalid on this basis is also correct because there is no principle that could limit a contrary conclusion to the case of sealed criminal charges alone. As appellants argued to that court and as is obviously true, the State's interests in avoiding a criminal suspect's possible flight or possible destruction of evidence may be impaired by press publication concerning a grand jury's investigation no less than by publication of the formal decision to bring charges. Accordingly, if punishment of the press for publishing the fact of criminal charges were permissible under the First Amendment, then the press could also be punished for publishing grand jury leaks because the *identical* state interests are involved and "less drastic means" to serve those interests are no more available in that case than in this one.

Nor could that result be limited to the grand jury investigation and the formal decision to file charges. The same state interests in avoiding flight and the destruction of evidence are equally implicated by publication of the fact that the police are investigating a particular lead, or, in a given case, that they have discovered and are pursuing one of an unnamed character, or even that a crime has been discovered. Since the *identical* state interests are or may be involved in each of these situations and the government's other means to serve those

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*(Footnote continued from preceding page)*

the press and others are ambiguous. The contempt sanction of ILL. ANN. STAT. ch. 38, § 112-6(b) is clearly limited to "[a]ny grand juror or officer of the court," as is further confirmed by the Committee Comments on the rule. The contempt sanction of N.C. GEN. STAT. § 15A-623(g) is similarly limited. OHIO REV. CODE ANN. § 2939.18 reads as broadly as Indiana's statute but the category of persons subject to sanction is probably limited by Ohio R. Cr. P. 6(E). The scope of Ky. R. Cr. P. 5.24(2)-(3) may be limited by the terms of subsection (1). Of the statutes and rules cited by appellants, only ARIZ. REV. STAT. ANN. § 13-2813, FLA. STAT. § 905.27, and OR. REV. STAT. §§ 132.420, 132.990 clearly appear to sweep as broadly as IND. CODE § 35-34-1-1(d) and punish publication by the press.

interests are no more effective in those circumstances than here, any constitutional authority to punish such publication would extend to each of them as well as many others.

At bottom, of course, innumerable legitimate and indeed worthy governmental interests, ranging from the conduct of foreign policy to the rehabilitation of juvenile offenders, could be more perfectly achieved were the government permitted to control the dissemination of information by the press. For reasons going to the very structure of the government created by our Constitution, however, this Court has determined that the State is constitutionally required to use other means even though they may work only imperfectly in a given case. *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 105 & n.2; *Landmark Communications, Inc. v. Virginia*, 435 U.S. at 841 & n.12, 845.

## II. The Court of Appeals Decision Is Also Clearly Mandated By This Court's Decisions Proscribing Prior Restraints On Publication Of Constitutionality Protected Speech.

In commanding that "no person" shall disclose that sealed criminal charges are pending and providing for punishment by contempt if that command is violated, IND. CODE § 35-34-1-1(d) provides for a prior restraint upon publication whenever, as here, the press already has or later learns of that information. The statute does present a variation on the "classic mold of prior restraint" under First Amendment law, which typically involves a "prior injunction against publication." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979). However, the threat of punishment by contempt is the sanction for violation of the typical injunction, and punishment by contempt is precisely what § 35-34-1-1(d) provides.

In imposing a prior restraint on publication by the press, § 35-34-1-1(d) wars with the most central principle embodied in the First Amendment. "[T]he main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'" *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454,

462 (1907) (emphasis in original). "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 713 (1931).

As the Court of Appeals noted, the seminal decision in *Near* identified only three exceptions to the First Amendment's prohibition of prior restraints on publication by the press. 283 U.S. at 716. Two of those exceptions have since been explained as involving "speech" that is not protected within the meaning of the First Amendment—obscenity and direct incitements to immediate violence. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 590 (1976) (Brennan, J., concurring in judgment). "[O]nly the third category in *Near* contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest"—speech endangering the Nation's "military security." *Id.* at 591.

The publication that § 35-34-1-1(d) restrains is clearly protected by the First Amendment. That speech and publication concerns the criminal justice system and the filing of criminal charges, and

> *the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.* " A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

*Nebraska Press Ass'n v. Stuart,* 427 U.S. at 559-60 (citation omitted, emphasis added).

Thus, this Court in *Nebraska Press* held invalid a prior restraint on pretrial publicity, notwithstanding the argument that the restraint served the State's interest in protecting the defendant's Sixth Amendment right to a fair trial. 427 U.S. at 569-570. Plainly, the state interest here in possibly rendering easier the arrest of a criminal suspect is *by definition* of no greater weight than the interest in protecting a defendant's *constitutional* right to a fair trial. Moreover, although *Nebraska Press Ass'n,* 427 U.S. at 569-70, held invalid on the facts of that case the prior restraint on publication of information independently acquired by the press, Justice Brennan wrote that such a prior restraint could never be validly entered, *id.* at 611-13, Justices Stewart and Marshall joined that opinion, *id.* at 572, and two other Justices indicated general agreement with it. *Id.* at 570-71 (White, J., concurring); *id.* at 617 (Stevens, J., concurring in judgment).

Further, the Court unanimously held, as a *per se* rule, that information the government had previously disseminated could not be restrained from publication. *Id.* at 567-68. Subsequently, in *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977), the Court again enforced that *per se* rule. Where the government had disclosed the identity of a juvenile offender, it could not, as a matter of law and without regard to any other consideration, restrain the press from publishing it. *Id.* at 310-12.

Thereafter, *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979), held that the First Amendment principles of *Oklahoma Publishing* could not be a limited to "situations where the government itself provided or made possible press access to the information." 443 U.S. at 103. In holding that the press could not constitutionally be punished for publication of independently acquired information, the Court reasoned that "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 104.

These decisions necessarily establish that outside the narrow area of national security, truthful publication of constitutionally protected, lawfully obtained information may not be restrained or punished by the government, as a *per se* rule.

Moreover, even in the case of military security—the *only* recognized exception to the First Amendment's ban on prior restraints of protected speech—the government bears a "heavy burden of showing justification for the prior restraint," which is still "presumptively unconstitutional." *Nebraska Press Ass'n,* 427 U.S. at 558. When that burden was not met in *New York Times Co. v. United States,* 403 U.S. 713 (1971), this Court refused to uphold a prior restraint on publication of the Pentagon Papers, "despite the fact that a majority of the Court believed that release of the documents, which were classified 'Top Secret-Sensitive' . . . would be harmful to the Nation . . . ." *Nebraska Press Ass'n,* 427 U.S. at 591-92 (Brennan, J., concurring in judgment).

Even were the State's interest in facilitating the arrest of a defendant sufficient to justify a prior restraint on publication—a legal proposition which appellees deny and which no authority supports—the statute in this case does not meet the standards applicable even to speech and publication endangering the Nation's military security. First, as is both apparent on the face of the statute and demonstrated by the facts of this case, IND. CODE § 35-34-1-1(d) contains no *substantive* limits to restrict prior restraints thereunder to circumstances where a compelling state interest is present. *See* pp. 16-17, *infra.* Second, as is also both apparent on the face of the statute and demonstrated by the facts of this case, § 35-34-1-1(d) provides no *procedural* protections to ensure that restraining publication is in fact required to accomplish the State's interest in the circumstances of the particular case. *See* pp. 21-22, *infra.* This Court has held that a hearing and articulated findings on the record are required even in "right of access" cases, which involve only a

presumptive First Amendment right that may be overridden by a substantial state interest actually served in the particular case. *Press-Enterprise Co. v. Superior Court,* ____ U.S. ____, 78 L.Ed.2d 629, 638-40 (1984); *Globe Newspapers Co. v. Superior Court,* 457 U.S. 596, 608-09 & nn.20, 25 (1982). *See* Part III, *infra. A fortiori,* such procedures would be mandated in the case of any otherwise permissible prior restraint, the most constitutionally suspect area of First Amendment law.[2]

The appellants contend that IND. CODE § 35-34-1-1(d)'s authorization of a prior restraint on truthful publication of constitutionally protected speech could be upheld under a "clear and present danger" test. However, this Court has restricted use of that analysis to carving out extremely narrow categories of constitutionally "unprotected" speech such as direct incitements to immediate violence. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 at 582, 12-9—12-11. Use of that test may indeed be limited to the context of immediate violence, *see Nebraska Press Ass'n,* 427 U.S. at 590 (Brennan, J., concurring in judgment); J. ELY, DEMOCRACY AND DISTRUST 110 (1980), and it is rarely if ever satisfied even in that context. *See, e.g., Hess v. Indiana,* 414 U.S. 105 (1973); *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In any event, under this Court's decisions, § 35-34-1-1(d) cannot be justified as preventing a "clear and present danger."

First, *Landmark Communications* held that the "clear and present danger" test is not and cannot be met by a pre-defined legislative category—in that case, all confidential information

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[2] To the extent that this statute departs from the classic, injunctive form of prior restraint, its effects are even more insidious. Unlike the case of the ordinary prior injunction, a party who may ultimately be charged with contempt under the statute is never afforded an opportunity to be heard before entry of the seal order. For that procedural reason alone, IND. CODE § 35-34-1-1(d) should be held unconstitutional. *See Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 181-84 (1968).

before a disciplinary commission. 435 U.S. at 843-44. That is precisely what the State here attempts to do under § 35-34-1-1(d) as to all criminal charges a court orders sealed. Appellants' "clear and present danger" contention erroneously equates that strict constitutional standard for defining *unprotected speech* with the far more permissive standards under which criminal charges may be sealed. In providing a prior restraint on publication in all cases where a court orders charges sealed, the statute is patently overbroad.

The "clear and present danger" standard is the most stringent known to constitutional law:

> [T]o warrant a sanction "[t]he fires which [the expression] kindles must constitute *an imminent, not merely a likely,* threat to the administration of justice. The danger must not be remote *or even probable;* it must *immediately imperil.*"

*Wood v. Georgia,* 370 U.S. 375, 385 (1962) (quoting *Craig v. Harney,* 331 U.S. 367, 376 (1947)) (emphasis added). *Accord, Landmark Communications,* 435 U.S. at 844-85. Assuming *arguendo* that this standard could ever be met in the case of press publication, § 35-34-1-1(d) obviously does not limit the court's authority to seal to such circumstances. Nor does it provide procedures to ensure that "an imminent, not merely a likely" danger is in fact involved and cannot otherwise be prevented in the circumstances of the particular case. This can be no better illustrated than by the facts of the case at bar.

The very day before it was restrained from publishing a story concerning the charges against Schoettmer, the Greensburg Daily News had published on its front page McKinley's article which reported that Deputy Martin had been suspended in connection with an arson involving Martin's truck and that a deputy prosecutor had said "other arrests may be pending in the case . . . ." Schoettmer and several of his relatives had been questioned by the police and had admitted Schoettmer's in-

volvement in the arson. Schoettmer was known by the police to be at Fort Knox, Kentucky. Appellants contended that the seal order was proper because Schoettmer's relatives *might* have learned of the charges, they *might then* have telephoned and told him, he *might then* have decided to flee in response to such a call, and he *might then* have been able to flee before the police arrived.

Given the previous day's front page publication that a prosecutor had said "other arrests may be pending" and Schoettmer's and his relatives' previous admissions of his involvement, the incremental probability that flight would be caused by newspaper publication of the fact that formal charges had been filed was no greater than the probability that *any* defendant might flee if so informed. Moreover, given that Schoettmer's location was known to the state authorities, the State's interest in restraining press publication may have been no greater than it would be in the case of any defendant. There was no explanation why the State's interest could not have been equally well served merely by a telephone call to the local police authorities. Under these standards, any and all criminal charges may be ordered sealed pursuant to IND. CODE § 35-34-1-1(d) and press publication may always be restrained and punished thereunder. These standards for sealing do not by definition satisfy the stringent requirements of the "clear and present danger" test for defining constitutionally unprotected speech.

Second, the analysis in *Landmark Communications* necessarily shows that the "clear and present danger" standard cannot be met in the case of publication by the press of the fact that criminal charges have been filed. After rejecting the argument that the legislature's pre-defined category could be found to present a "clear and present danger" in *Landmark Communications,* the Court *did not* say that the punishment for publication could nevertheless be upheld *if the facts of the particular case showed a "clear and present danger."* Rather, the Court reasoned by *category* and held the "clear and present

danger" test inapplicable altogether to justify punishment of publication of truthful information:

> The threat to the administration of justice posed by the speech and publications in *Bridges, Pennekamp, Craig,* and *Wood,* was, if anything, more direct and substantial than the threat posed by Landmark's article. If the clear-and-present danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here. *It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement. Moreover, much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings. Cf. Nebraska Press Assn. v. Stuart,* 427 U.S., at 564; *id.,* at 601 n.27 (Brennan, J. concurring in judgment). *In any event,* we must conclude as we did in *Wood v. Georgia,* that *"the type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification."* 370 U.S., at 388.

435 U.S. at 845 (emphasis added; footnote omitted).

The same considerations clearly dictate the Court of Appeals decision that § 35-34-1-1(d) is unconstitutional. The publication restrained and punished—which involves the criminal justice system and, in this case, election day allegations of misconduct by a public official and candidate for office—lies at the very "core of the First Amendment." *Landmark Communications,* 435 U.S. at 838. While "some risk of injury" to the State's interest is posed by publication, "much of the risk" can be avoided by other means. *Id.* at 845. The "type of 'danger' " that remains is " 'precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.' " *Id.*

Moreover, the possibility that the State will *otherwise* be unable to prevent a criminal suspect from successfully avoiding

arrest or destroying evidence if a newspaper publishes the fact that he has been charged can never be shown to be "imminent, not merely likely." *Wood v. Georgia*, 370 U.S. at 385. That risk can never be judged as "immediately imperil[ing]" rather than merely "probable." *Landmark Communications*, 435 U.S. at 845. Appellants cite *no* case upholding a prior restraint upon truthful newspaper publication on the basis of a "clear and present danger" analysis, and this Court's decisions show that apart from the area of national security, that standard can never be met in the case of press publication, as a matter of law.

## III. IND. CODE 35-34-1-1(d) Also Unconstitutionally Denies The Right Of Access To Information Under the First And Fourteenth Amendments.

IND. CODE § 35-34-1-1(d) is also unconstitutional in denying the press and public their presumptive right of access to governmental information without substantive and procedural standards to assure that denial is necessary in the individual case. In this case, appellees were not only restrained and threatened with punishment for publication of the facts they knew but also were denied access to all records pertaining to the charges filed against Schoettmer, including the transcript of the public probable cause hearing which related details of the arson and evidence of Deputy Martin's involvement. Although the Court of Appeals found it unnecessary to reach the issue in view of the other grounds for its decision, appellees presented and argued the right of access issue in the courts below and the judgment should be affirmed if there are any grounds to support it. *E.g., California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71 (1974).

This Court's recent decisions firmly establish that the First Amendment guarantees the press and public rights of access to information concerning the criminal justice system and proceedings therein. *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v.*

*Superior Court*, 457 U.S. 596 (1982). The First Amendment underpinning of the right of access is "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs'" and the structural role in "contribut[ing] to our republican system of self-government" that access to governmental information plays. *Globe Newspaper Co.*, 457 U.S. at 603-606 and authorities cited. Applying this reasoning, lower courts have held that the right of access applies at various stages of the criminal justice system. *E.g., Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (court's pre-trial records and files); *U.S. v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (bail reduction hearings); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) (restrictions on post-trial interviews of jurors); *U.S. v. Criden*, 675 F.2d 550 (3d Cir. 1982) (pre-trial hearings on motions to suppress and dismiss); *cf. Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (hearing on prisoner release pursuant to consent decree in civil action).

The analysis in these cases dictates that the presumptive right of access attaches at the point criminal indictments and informations are filed. As this Court has said in another context, the filing of criminal charges "is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). Furthermore, each of the First Amendment values identified by this Court as supporting the right of access "appl[ies] with equal force" at that point. *U.S. v. Criden*, 675 F.2d at 556-57.

For example, perhaps the most important function of public scrutiny is providing a check on abuse of judicial and prosecutorial power. *See Nebraska Press Ass'n*, 427 U.S. at 559-60; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 591-92, 595-96 (1980) (Brennan, J., concurring in judgment); *id.* at 604 (Blackmun, J., concurring in judgment). The benefits of that scrutiny are manifest at the point criminal

charges are filed. Sealing an indictment brought by a grand jury could be used to protect a personal friend or political ally of the court or prosecutor. Conversely, by securing and sealing criminal information, a prosecutor could obtain a powerful weapon with which to coerce an enemy. The public interest in avoiding such abuses is particularly apparent where, as here, charges are filed involving allegations during an election of misconduct by a public official, and the very possibility of such abuses militates in favor of public knowledge that criminal charges have been filed. *Cf. Nebraska Press Ass'n,* 427 U.S. at 606 (Brennan, J., concurring in judgment).

First Amendment rights of access are not absolute and may be limited in service to a substantial governmental objective. However, "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.,* 457 U.S. at 606-07. Moreover, the State's interest cannot be merely a generalized interest in secrecy, but must be present in the circumstances of the particular case. *See id.* at 607-08 ("as compelling as that [state] interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest") (emphasis in original).

In individual cases, legitimate governmental interests such as avoiding the flight of a defendant may override the right of access to information that charges have been filed pending the defendant's arrest. The constitutional defect of IND. CODE § 35-34-1-1(d) in this respect, however, is that it permits sealing absent a need for secrecy in the circumstances of the particular case. It provides neither standards that limit sealing to those cases in which it is justified, nor procedures necessary to ensure that such standards are met.

The right of access requires, first, that the government show that justification for secrecy exists in the particular case.

*Globe Newspaper Co.*, 457 U.S. at 606-07. Thus, the prosecutor must make a showing that if the indictment or information is not sealed, the harm sought to be prevented—*e.g.*, flight of the defendant—will be likely to occur. IND. CODE § 35-34-1-1(d) does not limit the authority to seal to such circumstances and does not require such a showing. It allows sealing even where the defendant already knows or suspects the charges will be brought, where flight has already occurred, or where the nature of the charge or the defendant's personal circumstances make flight highly unlikely. This is forcefully demonstrated by the facts of this case. *See* pp. 16-17, *supra.*

Second, § 35-34-1-1(d) does not require that a court consider whether less restrictive alternatives are available in the circumstances to serve the government's interest without denying entirely the right of access. *See Press-Enterprise Co.*, ____ U.S. at ____, 78 L.Ed.2d at 639. In a given case, for example, disclosure that criminal charges are pending in connection with a certain crime or criminal investigation may not create a substantial risk of flight so long as the defendant's identity is not disclosed. In this case, of course, the Greensburg Daily News had *already* published a front-page article stating that a deputy prosecutor had said other arrests may be pending in the case.

Finally, § 35-34-1-1(d) is patently deficient in not requiring that the reasons supporting a decision to seal "*be articulated in findings*" by the court, *Globe Newspaper Co.*, 457 U.S. at 608 n.20 (emphasis in original); *accord Press-Enterprise Co.*, ____ U.S. at ____, 78 L.Ed.2d at 640, thus preserving both rights of review and the availability of later public scrutiny of the decision. This case fully illustrates the reason for this Court's requirements of a hearing and articulated findings on the record, as the transcript of the probable cause hearing here reveals no facts or reasoning supporting the decision to seal.

## CONCLUSION

The Court of Appeals decision that § 35-34-1-1(d) is unconstitutionally overbroad in providing a penal sanction for truthful publication by the press is clearly mandated by this Court's decisions. That decision is also mandated by this Court's decisions proscribing prior restraints on publication of constitutionally protected speech. Finally, the Court of Appeals' judgment of unconstitutionality is also supported by this Court's right of access decisions. For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1984

HONORABLE JOHN WESTHAFER, as JUDGE of the CIRCUIT COURT OF DECATUR COUNTY, INDIANA, *et al.*,

*Appellants,*

v.

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, *et al.*,

*Appellees.*

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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## QUESTIONS PRESENTED BY APPEAL

1. Whether a State has any power to statutorily authorize judicial protection of the administration of justice by use of indirect contempt procedures against the press subsequent to disclosure, before arrest, of the specific fact that a particular sealed criminal indictment or information is in existence or pending.

2. Whether the State's interest in preserving public safety and health is a compelling state interest that is sufficient to justify the subsequent use of indirect contempt procedures, when no less restrictive and effective means are available, against the press for disclosing, before arrest, the specific fact that a particular sealed criminal indictment or information is in existence or pending.

## STATUTE INVOLVED IN CASE

The statute, which was declared unconstitutional *on its face* by the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) as infringing on First Amendment freedoms of the press, is Indiana Code §35-34-1-1(d), which provides:

> (d) The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

Similar provisions in other states are discussed at pages 6-7 of the Jurisdictional Statement, and some such provisions are appended thereto at A-21 to A-29.

## LIST OF PARTIES

Appellants in this case are the Honorable John Westhafer, as the Judge of the Circuit Court of Decatur County, Indiana, and Kenneth Bass, as the Prosecutor of Decatur County, Indiana. Appellees in this case are Worrell Newspapers of Indiana, doing business as the Greensburg Daily News, and Karen McKinley, a reporter for the Greensburg Daily News.

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## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The questions presented by this appeal involve only the declaration of *facial* unconstitutionality of an Indiana state statute by the Seventh Circuit. Although the Motion to Affirm did not directly address the two (2) questions in the Jurisdictional Statement, certain arguments of the Appellees deserve rebuttal.

1. The Appellees assert, without direct authority, that this Court has *de facto* created a *per se* rule invalidating any attempt by a state legislature to statutorily authorize its judiciary to protect the administration of justice by using indirect contempt procedures against the press. This assertion trivializes all of the decisions of this Court

applying the "clear and present danger" test. The Motion to Affirm quotes one sentence authored by Mr. Justice Douglas, while ignoring the thoughtful application of the test by this Court to the particular facts of each case. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed.2d 192 (1941).

The issue for decision in this appeal is whether the Indiana legislature exercised its discretion within constitutional limits in enacting Indiana Code §35-34-1-1(d). Both parties agree that the Indiana legislature specifically considered whether to broaden the scope of coverage of those persons disclosing the existence of criminal charges before arrest. Indiana Code §35-34-1-1(d) represented the legislative judgment that, in Indiana, the problem required amendment of the predecessor statute to potentially include the press in some particular cases. This Court has indicated that legislative discretion was present in this area:

> There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to require a newsman's privilege, either qualified or absolute.[1]

*Branzburg v. Hayes*, 408 U.S. 665, 706, 92 S.Ct. 2646, 2669, 33 L.Ed.2d 626 (1972). The Indiana legislature crafted

[1] Interestingly, the Indiana legislature enacted the Indiana Shield Statute, Indiana Code §34-3-5-1, which the Indiana Court of Appeals recently construed so as to require an absolute privilege. *Jamerson v. Anderson Newspapers, Inc.* (1984), Ind. App., 469 N.E.2d 1243, 1246.

Indiana Code §35-34-1-1(d) upon the model guidance of this Court, i.e., the preferred method of state action is for the state legislature to impose express statutory limitations on the use of the contempt power, but avoid a self-executing statute of general application in favor of a case-by-case determination of the specific "clear and present danger" by a neutral and detached trial court. *Wood v. Georgia*, 370 U.S. at 385, 82 S.Ct. at 1370; *Bridges v. California*, 314 U.S. at 260-261, 62 S.Ct. at 192. Since it has been nearly 23 years since this Court has applied the "clear and present danger" test to appropriate facts,[2] this appeal presents an ideal opportunity to reaffirm the vitality of the "clear and present danger" test and delineate the scope of discretion for State legislatures and State courts in this area.

2. Indiana Code 35-34-1-1(d) is not a prior restraint or a self-executing criminal statute of universal application. Even if this Court applies the "compelling state interest—no less restrictive means" test to Indiana Code §35-34-1-1(d) as urged by the Appellees, the Motion to Affirm has again trivialized the test. The Motion to Affirm essentially argues that since prior applications of the test resulted in the invalidation of statutes, this Court should abandon further application of the test in favor of automatic invalidation of the statute.

This argument is also a disguised plea for this Court to reverse its long-standing holdings and impose a *per se* rule prohibiting the state from protecting any state interest

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[2] The only modern case applying the "clear and present danger" test, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-845, 98 S.Ct. 1535, 1543-1545, 56 L.Ed.2d 1 (1978), should not control, since Mr. Chief Justice Burger stated therein:

> We question the relevance of that standard here; moreover we cannot accept the mechanical application of the test which led that court to its conclusion. 435 U.S. at 842, 98 S.Ct. at 1543.

when press publication may be involved, regardless of the circumstances in a particular case. This Court has consistently refused to enact such a *per se* prohibition, even for prior restraints, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 569-70, 96 S.Ct. 2791, 2808, 49 L.Ed.2d 683 (1976), despite press pleas for a *per se* rule. *See* Marcus, *The Media in the Courtroom*, 57 IND. L.J. 235, 246, n. 78 (1982). Proper application of the "compelling state interest—no less restrictive means" test should lead to the conclusion that Indiana Code §35-34-1-1(d) is *facially* constitutional.

3. The Jurisdictional Statement sets forth reasons why fifteen (15) states, including Indiana, have provisions which might arguably be construed as broadly as Indiana Code §35-34-1-1(d). See pages 6-7. The Motion to Affirm asserts that only four (4) such states have similar statutes. In any event, the number of states enacting a particular standard into law in our federal system should not be determinative of whether an enactment meets the minimum threshhold of *facial* constitutionality.

4. The Motion to Affirm includes extensive factual background to show that Judge Westhafer threatened to *apply* Indiana Code §35-34-1-1(d) so as to unconstitutionally infringe Appellees' rights. These facts are not relevant to the sole issue, which is whether said statute is *facially* unconstitutional. Furthermore, as a matter of law, Judge Westhafer could not have applied said statute and found Appellees in contempt. Jurisdictional Statement, p. 4. These facts show that the public was thoroughly informed about all circumstances in this case. In addition, the Appellees' November 5, 1984 article on the day of the arrest discussed the criminal information and arrest, as well as their reasons for delaying publication of the criminal information for one (1) day. *Karen McKinley Declaration*, ¶ 7; *John Murphy Declaration*, ¶7 and Exhibit B attached thereto.

5. The Appellees have built and burned another straw man in their claim that the state's interests in this case (Jurisdictional Statement, pages 5-6, 8-9) would apply to a wide variety of law enforcement situations, effectively eviscerating carefully cultured press freedoms. There is *no* other stage of criminal proceedings wherein state interests are identical to the stage after indictment and before arrest. First, unlike stages of criminal proceedings after arrest, no outcome-determinative event will occur that will deprive the press and public of the chance to observe and comment on the handling of the case in the criminal justice system. Unlike earlier stages in such proceedings, the state's interests in processing the suspect through the system after charges are formally filed have been confirmed (to the extent of finding probable cause) by a neutral and detached court. Furthermore, the state is far more likely to decide not to prosecute (an outcome-determinative event) prior to indictment, rather than after indictment and before arrest. There simply is no other identical stage of criminal proceedings with regard to the state's interests and the lack of potential for harm to the press and public.

6. Trial courts in Indiana are presumed to know all applicable law, including opinions of this Court, and statutes are routinely construed so as to incorporate federal and state constitutional requirements. This would include the need for findings or clear evidence in the record to support the order, as well as any consideration of less restrictive alternatives before entering such an order.

7. Since the Seventh Circuit did not decide whether Indiana Code §35-34-1-1(d) was unconstitutionally applied in this cause, or whether Appellees have a constitutional right of access to information about criminal proceedings, this Court should reverse and remand for the Seventh Circuit's consideration of these other issues.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

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